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No. 06-1702

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SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

RELIABLE CONSULTANTS, INC. d/b/a DREAMERS,

Petitioner,

v.

CITY OF KENNEDALE, TEXAS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether Petitioner has presented compelling reasons to grant the Petition, where the Fifth Circuit's opinion reversing the district court does not implicate an important federal question that has not been settled by this Court.

II. Whether Petitioner has presented compelling reasons to grant the Petition, where the Fifth Circuit's opinion reversing the district court does not conflict with a decision of this Court or a Court of Appeals.

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STATEMENT OF THE CASE

This case was brought by Reliable Consultants, Inc. d/b/a Dreamer's ("Petitioner"), a sexually oriented business, against the City of Kennedale, Texas ("Kennedale"). Petitioner is a business that sells and rents sexually explicit materials including videos, DVDs, magazines, and other merchandise. (Petitioner's Apdx. 4a-5a). Petitioner does not provide entertainment designed to be consumed by customers on Petitioner's property. *Id.* Petitioner's suit alleges, among other things, that Kennedale's zoning and licensing regulations of sexually oriented businesses violate the First Amendment as applied to retail-only, off-site businesses.

Petitioner and Kennedale both filed motions for summary judgment. To support the challenged regulations, Kennedale offered evidence in the form of studies performed by other cities, results and comments from Kennedale's own survey of local real estate appraisers, public comments by citizens, and relevant case law in determining that sexually oriented businesses, including off-site businesses, can generate harmful secondary effects that the regulations were designed to prevent.[1] *Id.*

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1. By commissioning a survey to obtain opinions from local real estate appraisers, Kennedale went above and beyond what it was legally required to do. Kennedale's actions do not support the incorrect statement made by Petitioner that Kennedale commissioned its own study due to a belief that "the Indianapolis and Oklahoma City studies were deficient . . ." (Petition for Writ 6).

The district court granted summary judgment to Kennedale as to most of the claims raised, but granted summary judgment to Petitioner on the issue of whether Kennedale's regulations were narrowly tailored to advance a substantial governmental interest. The district court concluded that Kennedale failed to present sufficient evidence of the harmful secondary effects caused by off-site sexually oriented businesses like Petitioner's, and enjoined Kennedale from enforcing its regulations against Petitioner. (Petitioner's Apdx. 66a-67a).

The appeal to the Fifth Circuit presented a single question: Whether the evidence offered by the City of Kennedale sufficiently supports its ordinance regulating sexually oriented businesses, including off-site businesses? (Petitioner's Apdx. 4a).

The Fifth Circuit properly analyzed Kennedale's evidence under the framework established by this Court in *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986) and *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002), reversing the district court and holding that Kennedale "produced evidence that it could have reasonably believed was relevant, and thus could have properly relied upon," concluding that Kennedale's "ordinances are narrowly tailored to advance a substantial governmental interest."

REASONS FOR DENYING THE PETITION

I. THE CRITERIA FOR REVIEW HAVE NOT BEEN MET BECAUSE THE COURT OF APPEALS APPLIED WELL-SETTLED PRINCIPLES OF LAW AS SET FORTH BY THIS COURT IN *RENTON* AND *ALAMEDA BOOKS.*

The only Supreme Court jurisdictional rule applicable to this Petition is Rule 10(a). In its first point of contention, Petitioner argues that the Fifth Circuit departed from the accepted and usual course of judicial proceedings by employing the wrong standard of review to reverse the district court's grant of summary judgment to Petitioner. However, the Fifth Circuit's review of Kennedale's sexually oriented business ordinances did not depart from the clearly accepted standard of review employed by circuit courts and this Court. The Court of Appeals correctly applied established law to the particular facts of this case.

Petitioner focuses its argument on the interpretation of a definition of "adult bookstore" contained in the evidence offered by Kennedale, asserting that the district court made a factual finding as to the definition, and faulting the Fifth Circuit for disturbing that finding on appeal. Petitioner opines that the Fifth Circuit's review was contrary to Rule 52(a) of the Federal Rules of Civil Procedure. However, Rule 52(a) is inapplicable on summary judgment where questions of fact can only be resolved in favor of a non-moving party and there are no witness credibility issues. By its express language, Rule 52(a) applies only where an action has been "tried upon the facts without a jury or with an advisory jury." Here, there was no trial because the matter at hand was disposed of on summary judgment.

The task of the appellate court when reviewing a grant of summary judgment is quite different from the review of a judgment entered after a full trial. "When reviewing a case disposed of under Fed.R.Civ. P. 56, an appellate court must apply the same general standard as that initially employed by the trial court-whether there is any genuine issue as to any material fact and whether the movant is entitled to judgment as a matter of law." *Bank of Commerce of Laredo v. City Nat. Bank of Laredo*, 484 F.2d 284, 289 (5th Cir. 1973) (citing 10 C. Wright & A. Miller, Federal Practice and Procedure § 2716, at 430 (1973)), *cert. denied*, 416 U.S. 905 (1974). Therefore, on summary judgment the appellate court undertakes an independent review of the entire record. *Stine v. Marathon Oil Co.*, 976 F.2d 254, 265 (5th Cir. 1992); Fed.R.Civ.P. 56. This review must be conducted without deference to the trial court's view of the case, viewing the record in the light most favorable to the party opposing the motion and indulging all reasonable inferences in that party's favor. Fed.R.Civ.P. 56. Like the trial court, the appellate court is not called upon to decide factual issues on summary judgment, but only to determine whether there may be factual issues to be tried. *McPhee v. Oliver Tyrone Corp.*, 489 F.2d 718, 720 (5th Cir. 1974).

Contrary to the position taken by Petitioner, since a summary judgment may not be entered where there is a genuine issue as to any material fact, there is no fact-finding function in connection with the entry of such a judgment. *Dredge Corp. v. Penny*, 338 F.2d 456, 463 (9th Cir. 1964). As this Court has previously noted, "Rule 52(a) applies to findings of fact, but does not inhibit an appellate court's power to correct errors of law, including those that may infect a so-called mixed finding of law and fact." *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 486 (1984).

As has long been recognized, "Whether . . . free speech rights have been infringed is a mixed question of law and fact." *Int'l Soc'y for Krishna Consciousness of New Orleans, Inc. v. Baton Rouge*, 876 F.2d 494, 496 (5th Cir. 1989) (citing *Dunagin v. City of Oxford*, 718 F.2d 738, 748 n. 8 (5th Cir. 1983), *cert. denied*, 467 U.S. 1259 (1984)). Accordingly, the appellate court's review is de novo. *Id.* (quoting *Dunagin*, 718 F.2d at 748 n. 8).

Petitioner stated, incorrectly, that Kennedale argued that because two of the studies relied upon contained the generic term "adult bookstore," they inherently must have referred to those stores that do not offer on-site entertainment. (Petition for Writ 7). Kennedale actually asserted that because the studies used the term "adult bookstore," it was ***reasonable*** for the city council to believe that the studies were applicable to stores that do not offer on-site entertainment. Contrary to Petitioner's argument, the Fifth Circuit did not make a factual determination regarding the definition of "adult bookstore;" instead the court made a legal finding, consistent with *Alameda Books*, that the city council was reasonable in its reliance on the studies. (Petitioner's Apdx. 9a). The Court of Appeals unequivocally indicated that it applied the constitutional framework in *Renton* and *Alameda Books* to its examination of Kennedale's ordinance. (Petitioner's Apdx. 6a). The Fifth Circuit did not define "bookstore," but merely overturned the district court's finding that Kennedale acted unreasonably in interpreting the studies as applying to stores that do not offer on-site entertainment. (Petitioner's Apdx. 64a-65a). The district court and the Fifth Circuit both made a finding of law as to whether Kennedale employed shoddy reasoning. The Fifth Circuit correctly identified that finding to be a legal determination, subject to *de novo* review. (Petitioner's Apdx. 5a).

As the Fifth Circuit correctly stated, the **existence** of evidence is a question of fact; while the determination regarding whether Kennedale reasonably relied upon the evidence is a question of law, reviewed *de novo*. (Petitioner's Apdx. 5a). Whether the evidence (the Oklahoma survey and the Indianapolis survey) exists is not in dispute. The parties merely disagreed upon whether Kennedale employed shoddy reasoning in relying upon the evidence to regulate a business such as Dreamer's. Petitioner attempts to argue that "the Fifth Circuit's decision here, if allowed to stand, will remove the key fact-finding role from the district court and place it in the hands of the appellate courts, which have no contact with witnesses or evidence other than through the lens of a district court." (Petition for Writ 10). Petitioner conveniently ignores that the decision under review is a summary judgment ruling, and the appellate court is privy to the exact same evidence that was before the district court. It is well-settled that the question of whether a movant is entitled to summary judgment is one of law, subject to *de novo* review. There was no departure from the clearly accepted standard of review; therefore, the criteria for review under Rule 10(a) have not been met and the writ should not be granted.

II. THE CRITERIA FOR REVIEW HAVE NOT BEEN MET BECAUSE A SPLIT IN THE CIRCUIT COURTS DOES NOT EXIST.

Petitioner contends that the Fifth Circuit Court of Appeals has rendered a decision in conflict with the Tenth Circuit Court of Appeals' *Heideman v. South Salt Lake City* unpublished decision. 2006 WL 245160 (10th Cir. 2006).[2]

2. This Court denied the Petition for writ of certiorari in *Heideman v. South Salt Lake City*. 127 S.Ct. 110 (2006).

Petitioner faults the Fifth Circuit for not expressly stating that its review was within the evidentiary burden-shifting framework set out by the Supreme Court in *Alameda Books*. A review of the Fifth Circuit's decision in the case at hand, however, shows that the appellate court did apply the burden-shifting analysis to Petitioner's appeal.

At the first step of the analysis, "the city certainly bears the burden of providing evidence that supports a link between" the regulation and the "asserted secondary effects." *Alameda Books*, 535 U.S. at 437. While the evidentiary burden is minimal at this first stage, the city cannot employ "shoddy data or reasoning." *Id.* at 437-38. However, "[t]he First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses." *Renton*, 475 U.S. at 51-52; *see also Alameda Books*, 535 U.S. at 451. The evidence must only be "reasonably believed to be relevant" in showing a connection between the source and the harm the city seeks to remedy. *Alameda Books*, 535 U.S. at 438.

In the case that is currently before this Court, Kennedale introduced nine studies from other cities that it relied upon regarding adverse secondary effects caused by sexually oriented businesses. (Petitioner's Apdx. 8a). Kennedale also introduced its own survey of opinions from local appraisers, as well as citizen commentary from public meetings, identifying adverse effects attributable to sexually oriented businesses within the local community. *Id.*

At step one of the evidentiary analysis, both the district court and the Fifth Circuit concluded that seven of the nine studies conducted by other cities failed to meet the heightened

evidentiary standard adopted by the Fifth Circuit in *Encore Videos, Inc. v. City of San Antonio*, 330 F.3d 288 (5th Cir. 2003). (Petitioner's Apdx. 8a; 64a). Since its *Encore Videos* decision, the Fifth Circuit has required that "a city that enforces an ordinance meant to prevent harmful secondary effects associated with the operation of an off-site business must rely on evidence showing that off-site businesses, rather than the broader category of sexually oriented businesses that include on-site businesses, cause harmful secondary effects." (Petitioner's Apdx. 7a, citing *Encore Videos*, 330 F.3d at 295). In the matter under review, the district court interpreted *Encore Videos* to require it to disregard the remaining two studies (the Indianapolis study and the Oklahoma City study). The Fifth Circuit determined that the remaining two studies relied upon by Kennedale both concluded that adult bookstores negatively impacted property values. The Court further determined that is was reasonable for Kennedale to believe that the term "adult bookstore" could refer to businesses offering no on-site entertainment, meeting the first step of the evidentiary analysis. (Petitioner's Apdx. 8a-9a).

At the second step of the analysis, the party challenging the regulations has the burden of offering "a competing theory" or "reason to question the city's theory." *Alameda Books*, 535 U.S. at 437. Faithful to the dictates of *Alameda Books*, the Fifth Circuit proceeded to step two of the burden-shifting analysis by considering Dreamer's challenge to the Indianapolis study and the Oklahoma City study, finding it without merit. (Petitioner's Apdx. 9a). The Fifth Circuit specifically addressed Petitioner's competing theories and found them insufficient to shift the burden back to Kennedale. *Id.* The Fifth Circuit employed the exact same analysis used by the Tenth Circuit in *Heideman*. 2006 WL 245160 at 3. Because Kennedale satisfied its burden and Dreamer's failed to present a competing theory or sufficient evidence to discredit Kennedale's evidence, the

Fifth Circuit concluded its analysis with a finding that Kennedale's ordinance is narrowly tailored to advance a substantial governmental interest. (Petitioner's Apdx. 11a).

While the Fifth Circuit may not have expressly stated that it was conducting a burden-shifting analysis, it is apparent in the body of its opinion that the appellate court applied the *Alameda Books* burden-shifting standard. Therefore, the Fifth Circuit's review of the present case was consistent with the Tenth Circuit's review of *Heideman v. South Salt Lake City*. 2006 WL 245160 (10th Cir. 2006). The Fifth Circuit's opinion in the present case is also consistent with the Second Circuit's opinion in *White River Amusement Pub, Inc. v. Town of Hartford*, 481 F.3d 163 (2nd Cir. 2007), and the Seventh Circuit's opinion in *Andy's Restaurant and Lounge, Inc. v. City of Gary*, 466 F.3d 550 (7th Cir. 2006). Based on Petitioner's criticism of the application of the *Alameda Books* burden shifting analysis by the circuit courts cited in its Petition, Petitioner is clearly under the mistaken belief that *Alameda Books* alters the standard of review found in Rule 56 of the Federal Rules of Civil Procedure. Taking Rule 56 into account, a split in the circuits does not exist. The criteria for review under Rule 10(a) have not been met, so the writ should not be granted.

CONCLUSION

Petitioner fails to advance any compelling reason for review. The Court of Appeals properly applied well settled principles of law. Review by the Supreme Court will not fulfill any of the requirements or goals of Rule 10. The petition for review should be denied.

This 26th day of July, 2007.

Respectfully submitted,

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